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IN THE

Supreme Court of the United States

WILLIAM A. BORDERS, JR.,
Petitioner,

v.

DISTRICT OF COLUMBIA OFFICE OF BAR COUNSEL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL BAR ASSOCIATION IN SUPPORT OF APPELLANT WILLIAM A. BORDERS, JR.

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BRIEF *AMICUS CURIAE* OF THE NATIONAL BAR ASSOCIATION IN SUPPORT OF APPELLANT WILLIAM A. BORDERS, JR.

INTEREST OF *AMICUS CURIAE*[1,2]

The National Bar Association ("NBA"), founded in 1925, is the nation's oldest and largest national association of predominantly African-American lawyers and judges. It has 84 affiliate chapters throughout the United States and affiliations in Canada, the United Kingdom, Africa and the

[1] This brief has been authored by Linnes Finney, Jr. and Daniel B. Snellings on behalf of the NBA. No person or entity has made any monetary contribution to this brief.

[2] In addition to the NBA, this *Amicus* Brief is endorsed by the Washington Bar Association, a voluntary bar association which is an affiliate of the NBA.

Carribean. The NBA represents a professional network of over 22,000 lawyers, judges, educators and law students.

Over the past twenty years the NBA has authored a number of *amicus curiae* briefs before the United States Supreme Court. These previous briefs pertained to fundamental Constitutional issues of equality and justice for which the NBA strives for our country to achieve. The latest brief was in 2000, when the NBA submitted an *amicus curiae* brief in *Bush v. Gore* on behalf of respondents regarding the electoral process.

The NBA's interest in the instant case is based upon three facts. First, William A. Borders, Jr. is a past-president of the NBA, having served with distinction in that capacity in 1980; second, in 1999 the organization passed a resolution officially supporting Borders re-admission based upon his documented rehabilitation and his continued commitment to the principles of justice and equality; and third, this case touches upon Constitutional separation of power issues as well as the fundamental right to work of Mr. Borders.

Pursuant to S.CT. Rule 37.2(a), written consent has been obtained from all parties to this case, and filed into the record.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1983, Petitioner William A. Borders, Jr. was disbarred by the D.C. Court of Appeals in an unpublished order. Disbarment was solely based upon Mr. Borders' conviction of an offense involving moral turpitude as set forth in D.C. Code § 11-2503(a).

On January 20, 2001, President Clinton issued a full and unconditional pardon to Borders. Following his pardon, Borders filed a motion with the D.C. Court of Appeals to vacate its Order of Disbarment on the ground that the Presidential Pardon nullified his convictions as well as his

disbarment, which was based solely upon his convictions. The D.C. Court of Appeals denied Mr. Borders' motion to vacate his disbarment based solely upon the discretion allowed to them by D.C. Code § 11-2503(a).

ARGUMENT

I. THE D.C. COURT OF APPEALS' DECISION IMPERMISSIBLY RESTRICTS THE POWER OF THE PRESIDENT AS SET FORTH IN ARTICLE II, SECTION 2 OF THE UNITED STATES CONSTITUTION.

Article II, Section 2, of the United States Constitution grants the President the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. This power is absolute and is not subject to legislative restriction.

Our democratic system imposes upon the three branches of government a degree of overlapping responsibility, a duty of interdependence as well as independence, the absence of which would preclude the establishment of a Nation capable of governing itself effectively. *Mistretta v. United States*, 488 U.S. 361, 381 (1989), quoting *Buckley v. Valeo*, 424 U.S. 1, 121 (1976).

Within this overlapping interdependence is the doctrine of separation of powers. In this case there is a separation of powers conflict between a legislative enactment codified in D.C. Code § 11-2503(a) and the powers of the President as set forth in the United States Constitution. To resolve this conflict "it is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137 (1803).

In *United States v. Klein*, 80 U.S. 128, (1872) this Court stated that "the President's power of pardon is not subject to legislation; Congress can neither limit the effect of his

pardon, nor exclude from its exercise any class of offenders." *See Id.* at 141. Further, this Court stated in *Klein* that "to the executive alone is intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offence pardoned and removes all its penal consequences." *See Id.* at 147. By enacting D.C. Code § 11-2503, Congress has restricted the Presidential pardon power and has "inadvertently passed the limit which separates the legislative from the executive power as stated in *Klein*." *See Id.* at 147. *Klein* is still the law, as cited in *Clinton v. Jones*, 520 U.S. 681 (1997); and *Miller v. French*, 530 U.S. 327 (2000).

D.C. Code § 11-2503(a) states that "Upon granting of a pardon to a member so convicted, the court may vacate or modify the order of disbarment." Such a restriction upon a Presidential Pardon is contrary to *Klein*, as well as a continuous line of jurisprudence dating back to as early as the 1830's.

In *United States v. Wilson*, 32 U.S. 150 (1833), this Court stated that:

> A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court. It is a constituent part of the judicial system, that the judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially. A private deed, communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted upon. *See Id.* at 161.

Or as stated more succinctly in *United States v. Padelford*, 76 U.S. 531 (1869), the effect of a Presidential Pardon is that in the eye of the law the offender is as innocent as if he had never committed the offense. *Id.* at 542.

This Court set forth the history of the Presidential Pardon power in *Schick v. Reed*, 419 U.S. 256 (1974). In *Schick* this Court stated, in essence, that the executive pardoning power is consistent with the English common law practice which existed in 1787. That is, the President has the power to grant reprieves and pardons, but his pardon shall not be pleadable in bar of an impeachment. *See Id.* at 262. This limitation as to impeachment tracked a similar restriction upon the English royal prerogative which existed in 1787. *4 W. Blackstone, Commentaries* *399-400. The *Schick* court went on to state that the Presidential pardoning power was intended to be generally free from legislative control. *See Id.* at 263.

This point was enlarged by Hamilton in his Federalist No. 74 which stated, in part:

> [H]umanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. . . It may be inferred that a single man would be most ready to attend to the force of those motives, which might plead for a mitigation of the rigor of law, and least apt to yield to considerations, which were calculated to shelter a fit object of its vengeance. *The Federalist No. 74*, pp. 500-501 (J. Cooke ed. 1961).

Further, as stated by Justice Marshall in *United States v. Wilson*, *supra*, "as this power (pardon power) had been exercised from time immemorial by the executive of that nation whose language is our language, and whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon."

In *Ex Parte Wells*, 18 How. 307 (1856) this Court was confronted with the issue of whether a President may confer a "conditional" pardon. In holding in the affirmative, this Court reasoned that the power to pardon extends to all kinds of pardons known in the law, and a conditional pardon is one of them. *See Id.* at 314. The *Wells* court went on to state that the

very essence of the pardoning power is to treat each case individually. *See Id.* at 314-315. The *Amici* asserts that, in essence, this allows the President, if so desired, to limit the pardon of an individual such that all disabilities are not extinguished by the President. Consequently, if an unconditional pardon is given by the President, as in the case of Mr. Borders, no such condition or disabilities are imposed upon that person pardoned and all disabilities incurred as a result of the conviction are removed.

As stated in *Schick*, the teachings of *Wilson* and *Wells* have been followed consistently by this Court. *Schick* at 266, citing *Ex Parte Grossman*, 267 U.S. 87 (1925); *Ex Parte Garland*, 4 Wall 333 (1867). In showing the strength of this precedent the *Schick* court quoted Justice Holmes in *Jackman v. Rosenbaum*, 260 U.S. 22 (1922) that "if a thing has been practiced for two hundred years by common consent, it will need a strong case to overturn it." *Id.* at 31.

Lastly, the *Schick* Court in utilizing the above reasoning held that "a fair reading of the history of the English pardoning power and the unbroken practice of this court since 1790 compels the conclusion that the power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress." *Schick* at 266.

The language of D.C. Code §11-2503(a) that "Upon granting of a pardon to a member so convicted, the court may vacate or modify the order of disbarment" is a restriction upon a Presidential pardon and is contrary to *Klein* as well as a continuous line of jurisprudence. The legislative act impermissibly limits the President's power to grant full pardons as envisioned by the Constitution.

II. THE D.C. COURT OF APPEALS' DECISION CONSTITUTES A DISABILITY IMPOSED UPON THE APPELLANT WHICH CONFLICTS WITH THE LAW OF THE UNITED STATES SEVENTH CIRCUIT COURT OF APPEALS.

As stated by the Judiciary Committee, in its *To Amend the Code of the District of Columbia: Hearings on H.R. 14974 Before the House Comm. On the Judiciary*, 64th Cong. 1st Sess 63 (1916), the right to work is a very serious property right. *See Id.* at 65. The court below appear to place significant emphasis upon certain limited statements made during the Judiciary Committee Hearing on the enactment of D.C. Code § 11-2503(a). The *Borders* Court cites *In Re McBride*, 602 A.2d 626 (D.C. App. 1992), for its emphasis that in proposing adoption of the amendment the House Committee on the Judiciary "explained that a pardon would not automatically reverse any disbarment, rather the decision to reinstate after the pardon remained with the court." *McBride* at 939 (citing *To Amend the Code of the District of Columbia: Hearings on H.R. 14974 Before the House Comm. On the Judiciary*, 64th Cong. 1st Sess 63 (1916). A closer review of this Committee hearing yields, however, strong conflicting messages.

A reading of the transcript from the hearing reflects that there was no consensus among the Judiciary Committee that a pardon would not reverse a disbarment. In fact the Chairman of the Committee, Edwin Webb of North Carolina, stated that a pardon should restore a disbarred member to the practice of law. *See Id.* at page 65. The Chairman went on to state that "a pardon restores everything else. It restores the right to vote, and I do not see why it should not restore the right to make a living." *Id.* In response to this remark, Mr. Tobriner, who headed the committee representing the Bar Association of the District of Columbia, replied, "It is a property right." to which the Chairman replied, "Certainly it is, and a very serious right, too." *Id.*

The hearing transcript, although only several pages, clearly suggests that the Judiciary Committee was strongly divided on this issue. Accordingly, reliance by the *Borders'* Court upon limited comments without comment upon significant contradicting comments is questionable.

It has been stated that the right to work and the concomitant opportunity to achieve economic security and stability are essential to the pursuit of life, liberty, and happiness. As early as 1915, the United States Supreme Court declared that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of [the Fourteenth] Amendment to secure. *Truax v. Raich*, 239 U.S. 33, 41 (1915).

In the medical license denial case of *Barsky v. Board of Regents*, 347 U.S. 442 (1954), Justice Wendell Douglass wrote in his dissent that:

> The right to work, I had assumed, was the most precious liberty that man possesses. The American ideal was stated by Emerson in his essay on Politics. 'A man has a right to be employed, to be trusted, to be loved, to be revered.' It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on a curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit strength against the forces of nature, to match skills with his fellow man.

In *Bjerkan v. United States*, 529 F.2d 125 (7th Cir. 1975) it was held that a Presidential Pardon releases all disabilities imposed by the offense. The *Bjerkan* court held that any deprivation or suspension of any inalienable rights, of which, the pursuit of happiness of all avocations and all positions are alike, open to everyone, constitutes punishment. *Id.* at 128. As such, the deprivation of a person's basic inalienable

rights, including the right to work in certain professions, constitutes punishment and that such punishment would constitute a restriction on the Presidential Pardon power. *Id.*

Thus, the denial by the Court below of Mr. Borders' right to work in his chosen profession constitutes a punishment or disability that has been held by the Seventh Circuit to be an impermissible restriction of the Presidential Pardon power. The *Borders'* decision below is thus contrary to the law of the United States Seventh Circuit Court of Appeals that a Presidential Pardon releases the offender from all disabilities imposed by the offense as stated in *Bjerkan.*

It is undeniable that the denial of Mr. Borders' right to work is a disability imposed upon Mr. Borders. If President Clinton had so desired to have this disability remain he could have and would have granted Mr. Borders a "conditional" pardon with that condition. The fact remains that President Clinton did not grant Mr. Borders a "conditional" pardon, but a full and unconditional pardon.

The word "full" as defined by the Oxford University Press means "not lacking or omitting anything, complete." The word "unconditional" as defined by the Oxford University Press means "not subject to any conditions." The D.C. Court of Appeals' decision to deny Mr. Borders his right to work in his chosen profession based solely upon his prior conviction pursuant to D.C. Code §11-2503(a) is an impingement upon the Presidential pardon power and should be vacated.

In *Re Abrams*, 662 A.2d 867 (D.C. App. 1995) the facts almost completely mirror our case below. In *Abrams* the D.C. Court of Appeals had to determine whether to reinstate Mr. Abrams, a disbarred attorney who had received a full and unconditional Presidential pardon. In *Abrams*, however, the D.C. Court of Appeals allowed for reinstatement, the basis of which mirrors the argument of Petitioner in this case.

The *Abrams* court concluded that the suspension from the practice of law would have a punitive impact on an attorney and thus a full and unconditional pardon protected him from any kind of official disciplinary or punitive response. Further the *Abrams* court stated that an unconditional pardon bars the government from penalizing the offender in any way for the conduct underlying the pardon.

The *Abrams* court stated that "disciplinary proceedings against a member of the bar, although intended to protect the public and preserve the integrity of the legal profession, nevertheless have the additional effect of punishing the sanctioned attorney. *Id.* citing *In re Ruffalo*, 390 U.S. 544 (1968). Disciplinary matters are adversary proceedings of a quasi-criminal nature. *Id.* at 551. Exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct. *Abrams at 877* citing *Garland* at 377.

In reaching its decision the *Abrams* court concluded that "any deprivation of a person's basic civil rights, including the right to vote, the right to serve on juries, and the *right to work in certain professions* on account of a federal conviction will constitute a restriction on the legitimate, constitutional power of the President to pardon an offense against the United States and will be void as circumscribing and nullifying that power. *Id.* at 879 citing *Bjerkan* at 128.

This opinion in *Abrams* is consistent with this Court's interpretation and application of the pardon power as stated in *Wilson, Wells, In Re Garland, United States v. Klein, Ex Parte Grossman*, and *Schick v. Reed, supra.*

In fact, the D.C. Court of Appeals states in the *Abrams* opinion that it has laid out the history of these preceding Supreme Court cases to highlight two significant features of a full and unconditional Presidential Pardon. First, the Court has made it clear that such a pardon attaches not just to a

criminal conviction, but also to the conduct which is or may be the basis of a conviction. *Abrams* at 876. Second, because the pardon attaches to the underlying conduct, the Court has established that a pardoned offender enjoys immunity not only from a criminal prosecution, but also from any other form of punishment or civil disability imposed as a consequence of his actions. *Id.*

Although the opinion in the *Borders*' court below is contrary to its position in *Abrams,* the court below distinguished the *Abrams* and *Borders* cases on two premises. First, the *Borders*' court distinguished that *Abrams*' conviction did not stem from the application of §11-2503(a) and did not involve a conviction of a crime of moral turpitude. It is of import to note, however, that the alleged misconduct of Abrams involved the veracity of his sworn testimony before the House Intelligence Committee investigating Iran-Contra. This misconduct, if it had been proven, would have amounted to a crime of moral turpitude. Thus, the court below distinguished *Borders* and *Abrams* based upon the conviction only and not the conduct surrounding the conviction.

Secondly, the *Borders*' court distinguished the *Borders* and *Abrams* cases based upon the fact that in *Abrams* the pardon was issued before the attorney was disciplined and in *Borders* the pardon came after the attorney was disciplined. The meaningfulness of this distinction, however, was not set forth by the court below except to note said distinction.

Thus, it appears the D.C. Appeals Court's basis denying Mr. Borders' reinstatement is because he was pardoned after conviction of a crime of moral turpitude. In *Chaunt v. United States*, 364 U.S. 350 (1960) this Court held that Petitioner's naturalization decree could not be set aside lightly and remanded the case back to the Ninth Circuit to determine whether the evidence of Petitioner's acts of moral turpitude were clear, unequivocal and convincing so as to leave no doubt of the issue. In the *Chaunt* dissent of Justices Clark,

Whittaker and Stewart, it was noted that the intentional concealment of a material fact and a willful misrepresentation of the petitioner was not in dispute and that such offenses involve moral turpitude. *Id.* at 357. These Justices further noted that the felony in that case reflected upon the character of the man seeking citizenship and strips the offender of all civil rights and leaves a shattered character that "only a presidential pardon can mend. *Id. at 358.*

The D.C. Appeals Court's denial of Mr. Borders' reinstatement because he was pardoned after conviction of a crime of moral turpitude, however, flies in the face of *Garland.* In *Garland,* the pardon occurred after the conviction of Attorney Garland for various acts of treason and other crimes of moral turpitude against the United States. Thus, this said distinction in *Borders* is contrary to the law as set forth by this Court in *Garland.* It is noteworthy that Mr. Garland, after re-admission, went on to become the Attorney General of the United States, and serve this country with distinction throughout the remainder of his life.[3] Like Mr. Garland, Mr. Borders has been granted a full unconditional pardon by the President of the United States and should be reinstated to practice law and thus be granted the opportunity to practice law with distinction.

CONCLUSION

It is the considered opinion of the *Amici* that Mr. Borders has been rehabilitated and is worthy to once again practice law. More importantly, it is the opinion of the President that Mr. Borders is rehabilitated and worthy of a full and unconditional Presidential Pardon. This decision cannot be questioned. The D.C. Court of Appeals, however, has modified and placed a restriction upon Mr. Borders' pardon. This restriction and/or modification is unconstitutional and con-

[3] Ironically, he died on January 26, 1899, in Washington DC, while arguing a case before the Supreme Court.

trary to the law of this Honorable Court, as well as the law of the Seventh Circuit Court of Appeals. For the above and foregoing reasons, *Amici* joins Petitioner in seeking a reversal of the D.C. Court of Appeals' ruling and to reinstate Mr. Borders back to the practice of law.

Respectfully submitted,

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